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4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 JASON LEE SUTTON,

7 Plaintiff,

8 v.

9 DARREN HEAWARD ET. AL.,

10 Defendants.

Case No. C17-5546-RJB-TLF

ORDER ON MOTION TO
SUPPLEMENT THE RECORD

11 The District Court has referred this 42 U.S.C. § 1983 action to United States Magistrate
12 Judge Theresa L. Fricke. Defendants have moved for summary judgment. Dkt. 32.

13 Several months after the discovery deadline, Dkt. 25, plaintiff moved to supplement the
14 record to add an exhibit to his Response and Opposition Brief. Dkt. 59. Defendants responded.
15 Dkt. 63. Plaintiff seeks to introduce a Senate Bill Report, 2ESSB 5294, that contains a “Staff
16 Summary of Public Testimony.” The document states that witnesses had testified about the
17 problem of retaliation by DOC managers against DOC employees who acted as whistleblowers
18 regarding misreporting of data. Dkt. 59-1, p. 7.

19 “The evidence on which a party opposing summary judgment relies must be admissible at
20 trial, but the evidence need not be in admissible form. *See, e.g., Clark v. Cnty. of Tulare*, 755 F.
21 Supp. 2d 1075, 1082-82 (E.D. Cal. 2010).” Evidence is relevant if it has “any tendency to make
22 the existence of any fact that is of consequence to the determination of the action more probable
23 or less probable than it would be without the evidence.” Federal Rule of Evidence (FRE) 401;
24 *Millenkamp v. Davisco Foods Intern., Inc.*, 562 F.3d 971 (9th Cir. 2009). “Evidence of a person's
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1 character or character trait is not admissible to prove that on a particular occasion the person
2 acted in accordance with the character or trait.” FRE 404(a)(1).

3 The Court will deny Sutton’s motion to add the Senate Bill Report to the record. Sutton
4 has not shown that the Report is relevant to any of the issues in his Section 1983 suit, which
5 pertains to the conduct of three individual defendants. The testimony recounted in the Report—
6 even if it does not constitute inadmissible hearsay—has no tendency to make more or less
7 probable Sutton’s assertion that defendants Heaward, Kettel, and McKenney conspired to
8 wrongfully infract him, nor any other fact of consequence to his due process and retaliation
9 claims. Rather, as defendants also point out, Sutton’s motion appears to rely on an impermissible
10 inference that DOC employees have a propensity to retaliate and that the three defendants acted
11 in accordance with that propensity with respect to Sutton. *See* FRE 404(b).

12 Because the proffered evidence would be irrelevant and inadmissible, Sutton’s motion to
13 supplement, Dkt. 59, is DENIED.

14 Dated this 30th day of July, 2018.

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Theresa L. Fricke
18 United States Magistrate Judge
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